RECORD AND BRIEFS

Supreme Court, U.S.
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No. 14-10154

IN THE SUPREME COURT OF THE UNITED STATES

STEPHEN VOISINE and
WILLIAM E. ARMSTRONG III, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

VIRGINIA G. VILLA
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The Solicitor General makes two new arguments in opposition. Both focus on issues of waiver. The first states that the constitutional questions, aside from the Second Amendment, are foreclosed because not preserved in the conditional plea agreements of the Petitioners. *See* Br. In Opp. at 16-17, 28. The second argument is that this Court's remand order to the First Circuit did not encompass the issue regarding whether *Descamps v. United States*, 133 S.Ct. 2276 (2013) renders Section 922(g)(9) unconstitutional as construed in *United States v. Hayes*, 555 U.S. 415 (2009). Both arguments find small support in the facts or the law.

As to the first argument, the relevant text of both guilty pleas are the same and read, "I reserve the right ... to have an appellate court review this court's decision ... denying my Motion to Dismiss Indictment." Both Motions to Dismiss challenged the Indictments based on the failure to state a federal offense, in that the listed conviction did not constitute a "misdemeanor crime of domestic violence," and that, if the statute were applied to these convictions, it was unconstitutional pursuant to the Second Amendment.

The additional constitutional questions arguably come within the appeal rights reserved in the Conditional Plea Agreements pursuant to *Griffin v. Kentucky*, 479 U.S. 314 (1987). *Griffin* established that new rules for the conduct of criminal prosecutions shall be applied to all cases pending on direct appeal. Petitioners raised their Fifth Amendment Due Process claims after the First Circuit issued its decision in *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012)(overruling prior interpretation of 18 U.S.C. § 922(g)(4) based on doctrine of constitutional

avoidance). The Government argued that Petitioners had waived the Due Process argument as not included in their Conditional Pleas. The First Circuit rejected the waiver argument and reviewed the Fifth Amendment claims under a plain error review. *See United States v. Armstrong*, 706 F.3d 1, 6 (1st Cir. 2013). This approach is consistent with both *Griffin, supra*, as well as *United States v. Kingcade*, 562 F.3d 794, 797 (7th Cir. 2009).

The Government also argues waiver of the *Descamps* claim as exceeding the scope of remand from this Court. The First Circuit indicated that the issue did not fall within the remand order. *See United States v. Voisine*, First Cir. No. 12-1213. slip op., at 26, Appx. The Government argued the scope of the remand order in its reply brief. The First Circuit's briefing order did not allow an opportunity to respond to this argument. A lack of opportunity to object does not constitute agreement.

Petitioners first raised the impact of *Descamps* in their initial Petition to this Court. The Government argued in opposition that the issue had been waived. The Court granted the Petition and remanded in light of *United States v. Castleman*, 134 S.Ct. 1405 (2015). The first time this Court unequivocally held that the categorical approach applies to Section 922(g)(9) was in *Castleman*. *See id.*, at 1413. In light of *Hayes*, *Castleman* may have held the categorical approach inapplicable. It did not. Questions regarding the application of the categorical approach to 18 U.S.C. § 922(g)(9) thus fall within the remand order.

There are many federal criminal statutory provisions, such as Section 924(e)(2)(B), which predicate certain repercussions based on prior convictions. To date, Section 922(g)(9) is the only one allowing a later conduct-specific inquiry into the facts underlying a prior conviction where the fact forms no part of the elements of the prior conviction. At least one justice of this Court has endorsed amplifying this procedure: "Nor would a conduct-specific inquiry raise constitutional problems of its own. It is questionable whether the Sixth Amendment creates a right to a jury trial in this situation. *See Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). But if it does, the issue could be tried to a jury, and the prosecution could bear the burden of proving beyond a reasonable doubt that a defendant's prior crimes involved conduct that presented a serious potential risk of injury to another. I would adopt this alternative interpretation and hold that the residual clause requires an examination of real-world conduct." *Johnson v. United States*, 135 S.Ct. 2551, 2580 (2015) (Alito, J, dissenting). This Petition highlights the possible multitudinous constitutional problems presented by allowing a fact-finder, including a jury, to find that a prior conviction involves an additional "component," *see* Br. In Opp. at 30-31, that formed no part of the original conviction. As the First Circuit addressed many of these issues on their merits, review of all the constitutional questions presented is appropriate.

Supreme Court Rule 10 lists a number of considerations that may trigger review by this Court. Many consist of conflicts between various tribunals. The Government advocates allowing the lower courts to address these questions in the

first instance. The conflicts noted by this Petition are either ones that the circuits have addressed (such as whether "use of physical force" encompasses reckless conduct) or are ones that arise because the statutory construction in *Hayes* is difficult to justify in light of the constitutional holding in *Descamps*. They are conflicts ripe for resolution by this Court.

Dated: September 14, 2015

Respectfully submitted,

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Attorney for Petitioners

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2014

WILLIAM ARMSTRONG III and STEPHEN VOISINE,	)	No. 14-10154
Petitioners,	)	
v.	)	CERTIFICATE OF SERVICE
UNITED STATES OF AMERICA,	)	
Respondent.	)	

Virginia G. Villa states that all parties required to be served have been served and that one true and correct copy of the Petitioners' Reply to the Brief in Opposition was served on the persons listed below on the 14th day of September, 2015, by depositing one copy of the same with the United States Post Office, First-Class postage prepaid, addressed as follows:

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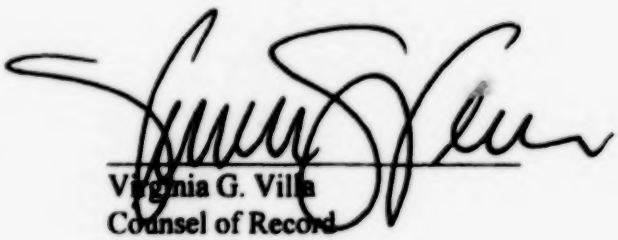

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Mr. Scott Harris
Clerk, Supreme Court of the U.S.
1 First Street N.E.
Washington, D.C. 20543

September 14, 2015

Re: Stephen Voisine and William Armstrong III v. United States
No. 14-10154

Dear Mr. Harris:

Enclosed for filing please find the following documents in the above referenced matters:

1. The original and ten copies of Petitioners' Reply to Brief in Opposition; and
2. Certificate of Service.

Sincerely,

VIRGINIA G. VILLA
Attorney for Petitioners

c: Donald B. Verrilli, Solicitor General
Stephen Voisine
William Armstrong III

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